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SUPREME COURT U.S.

No. 91.

DEC 10 1948

IN THE

Supreme Court of the United States

October Term, 1948.

FOLEY BROS., INC. and SPENCER, WHITE and PRENTIS, INC.,

Petitioners,

vs.

FRANK PAUL FILARDO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

BRIEF FOR RESPONDENT.

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Opinions Below.

The opinion of the Supreme Court of the State of New York, New York County, is set forth in the record (R. 81, 82-84). The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 129-131) is reported at 272 A. D. 446. The opinion of the Court of Appeals of New York (R. 132-138) is reported at 297 N. Y. 217.

Jurisdiction.

The jurisdiction of this Court was invoked under 28 U. S. C. 1257 (3). The petition for certiorari was granted on October 11, 1948.

Questions Presented.

1. Whether the Eight Hour Law, and particularly Sections 324 and 325A, Title 40, U. S. C. has extra-territorial effect outside of the United States, and if this question is answered in the affirmative, then,

2. Whether an employee has a right of action to recover his just overtime pay, either (a) under the statute, or (b) as a third party beneficiary by reason of the contractual provisions in the contract between the petitioner herein and the United States.

All of these questions were ruled upon by the Court of Appeals and were answered unanimously in the affirmative (R. 132-138).

Statutes Involved.

The statutes involved and to be construed are Sections 324, 325A and 326 of Title 40 of the U. S. C.

Statement.

The facts in this case are not in issue and are therefore undisputed. The respondent, an American citizen, was a cook and employed in the City of New York, by the petitioners, to work on public projects in Iraq and Iran, in which the petitioners were engaged, in accordance with a contract had with the War Department of the United States Government, during the year 1942 (R. 44, 87, 88). Pursuant to the terms of the employment, respondent was transported from New York to Iraq, arriving there in March 1942, and thereafter was assigned as a cook to a camp at Ahwaz, Iran, and in May 1942, when he found out he was not receiving overtime pay for hours worked in excess of eight hours a day, he protested and made a demand for the same, which was disapproved (R. 18, 19). Respondent then was assigned to a camp in the desert in Iran (R. 19), and worked there from June 1942 to Decem-

ber 31, 1942, and upon returning to the base in March 1943, filed another claim for overtime (R. 22) and another in New York when he arrived in June 1943 (R. 23, 95, 96). Respondent's testimony as to overtime was supported by the assistant foreman of the camp (R. 37-40), and it was further testified that he and other employees received overtime pay at time and a half (R. 38, 39). At the close of the case, the petitioner moved to dismiss on all the grounds raised herein and on the additional ground that the respondent was not a laborer within the meaning of the Eight Hour Law (R. 49). Said motions were denied, and the jury awarded a verdict to the respondent in the sum of $2,496.36 for overtime pay on the basis of 1,172 hours overtime (R. 85).

The third party beneficiary doctrine is involved because the contract that the petitioners had with the United States contained the following clause, that the petitioner agreed to "abide by all applicable laws, regulations, ordinances and other rules of the United States of America of the States, Territory, all political subdivisions thereof, or any other duly constituted public authority wherein the work is done" (R. 98). The judgment of the trial court was thereafter appealed by the petitioners to the Appellate Divsion, State of New York, First Department, and said judgment was reversed (three justices voting to reverse and two justices voting to affirm), which court passed on only one question, to wit, right of action under the statute for overtime pay (R. 131). An appeal was thereafter taken by the respondent to the Court of Appeals of the State of New York, which reversed the judgment of the Appellate Division and reaffirmed judgment of the trial court unanimously on all questions (R. 132, 138). It is respondent's contention that the trial court and the Court of Appeals of the State of New York were eminently correct in deciding all the questions presented herein in favor of the respondent.

Summary of Argument.

I.

The Eight Hour Law applies extra-territorially. The literal language of the act itself would include all contracts performed within or without the United States, its territory or its possessions. There is no question but that Congress has the power to legislate regarding the conditions of work on public contracts and especially in regard to the civil aspects of said Statute.

The purpose of the Eight Hour Law under consideration is to benefit the American worker on public construction everywhere and all of the governmental agencies which have had the occasion to interpret the geographical extent of the act have held that it extends beyond the borders of the United States, its territory and possessions, at least with respect to American laborers and mechanics on public conracts.

Furthermore, with the advance of our political thinking, whereby the United States Government has committed itself as a world power with far flung interests, it certainly was within the intent of the present day Congress to protect the American laborer everywhere working under American supervision, on government projects, paid for by American money, and with American materials, and to give him at least the same standard of wage as other Americans employed at home on similar projects.

II.

Section 324 of the U. S. C., when read together with Section 325A, confers upon those encompassed by the Act the right to sue for the failure of any contractor to abide by its provisions, and specifically for the required overtime pay for work done and benefits received. While it is true that prior to the 1940 amendment (Section 325A), which specified that time and a half was to be paid for all

overtime work, the interpretations of this court were that a laborer or mechanic covered by the act had no right to sue because of the statutory omission to prescribe a rate of pay, this defect is no longer present since the 1940 amendment. The necessary language which led the court to rule concerning a similar statute in connection with the Eight Hour Law, that a beneficiary thereunder had a right to sue for overtime pay under the Eight Hour Law (Letter Carrier's Act of 1888, *United States* v. *Post*, 148 U. S. 124) is now supplied by Section 325A and confers a right to sue for overtime pay to laborers and mechanics on public works under contracts with the Government.

Where a statute does not explicitly provide for a remedy but is manifestly passed for the benefit and protection of certain classes thereunder, the party who has suffered or been aggrieved has a cause of action for the benefits under the statute. This has been held to apply in statutes of similar nature, to wit, Workmen's Compensation and Minimum Wage Statutes in this and other jurisdictions.

The petitioners, in their brief, while admitting this to be a general rule, argue in opposition to this point that the Statute in question were not enacted for the benefit of the laborer or mechanic on public works, and attempt by circuitous reasoning to show that the statute was enacted for the benefit of the public generally. A reading of the Statute itself, which is unambiguous and clear, specifically designates the persons to be benefited as being laborers and mechanics engaged on public works for the United States Government. The various agencies which have passed upon the statute, have affirmatively stated that the statute was passed solely for the benefit of the laborers and mechanics employed under public contracts. A reading of the Congressional Record prior to the passage of the Act and various amendments further confirm this contention. The argument therefore is against the plain reading of the Statute and its amendments and its common sense interpretation.

III.

The employee has a right to sue as a third party beneficiary by reason of the inclusion in the contract that the petitioner had with the United States Government for the construction of said public works in Iraq and Iran, the provision that the petitioner agreed to "obey and abide by all the applicable laws, regulations, ordinances and other rules of the United States of America of the States, Territory or all Political Subdivisions thereof or any other duly constituted public authority, wherein the work is done" (R. 98).

Where a clause is inserted in a contract, which is manifestly for the benefit of a specific class of persons, to wit, laborers and mechanics on public works of the United States, the third party beneficiary doctrine applies both under Federal law as well as the law of the State of New York. The Eight Hour Law, and particularly the provision as to time and a half for overtime pay has heretofore been demonstrated as benefiting those workers and laborers employed by the government either directly or by contractors who have contracts with the government for the building of public works (Point II).

A fair reading of this clause in the contract would include the Eight Hour Law if held applicable under Point I. To read the contract in the manner petitioner suggests would invalidate the contract and prohibit any payment thereunder. It is a rule of law, that where a contract can be read so as to make it legal, the courts will not interpret it as to render the contract illegal and unenforceable.

I.

The Eight Hour Law Has Extra-Territorial Effect.

A. The History of the Eight Hour Law.

It would be well to review the history of the Eight Hour Law. The first "Eight Hour Law" was enacted in 1868, and at that time merely contained a provision that laborers and mechanics on all public works constructed by the government, were not permitted to work more than eight hours per day (15 Stat. 77 ch. 72). Thereafter, and in 1892, the aforesaid Eight Hour Law was re-enacted to the same effect, but added sanctions, in that failure to abide by the aforesaid law because a misdemeanor, 27 U. S. Stat. 340, Chap. 352; Sec. 322 U. S. C. Thereafter and in 1912, the same law was re-enacted and broadened to include laborers and mechanics who were employed by contractors who had public contracts with the United States Government, as well as such employees of the government, and added the civil sanction of $5.00 a day for each violation of the law (Sec. 324 U. S. C.). Thereafter, and in 1917, during the First World War, there was voted presidential powers to suspend the operation of the Eight Hour Law with respect to all of the aforesaid in case of a national emergency, provided that there was a premium pay at not less than one and one-half times the regular rate over and above the basic Eight Hour Law (39 U. S. Stat. 1192, Chap. 180). These powers were enacted permanently into the law in the present Section 326 of the Statute.

In September 1940, before our entry into the Second World War, Congress realizing the necessity of extensive military construction at home and abroad for the defense of the country, enacted Section 325A, which provided that the Eight Hour Law be suspended on the condition that

all laborers and mechanics thereunder who worked in excess of eight hours per day, be compensated at at least one and one-half times the basic rate of pay. There was also a provision in the Eight Hour Law which required that all contracts on such public works should contain a provision to comply with said law (Sec. 324).

A fair reading of the Congressional Record shows that the law was intended directly to benefit the American laborer and mechanic employed by the Government in the building of public works, and that it was the further aim of Congress by its treatment of Government workers to set private industry and the world an example in the betterment of working conditions in the hope that others would follow. Therefore, the intention is clear that at least that group designated by the Statute, to wit, mechanics and laborers, working for or on behalf of the United States Government, were to be directly benefited. True, indirectly, it was intended to show the world an enlightened policy with regard to labor. Such however is the broad aim of every advanced labor or social legislation. (23 Cong. Rec. 5724-5732; 48 Cong. Rec. 381-385, 394-395; 54 Cong. Rec. 2588-2590, 3150-3151; 86 Cong. Rec. 11216-11219).

This is even more applicable to Sec. 325A, which is the primary one under discussion and because of which respondent's right ensues. In the discussions in Congress concerning the passage of this amendment, which was by way of an amendment to the Naval Appropriations Bill, Congress discussed public constructions outside the continental United States on the question of the waiving of a bond for such constructions (86 Cong. Rec. 11219). This discussion came hard after the passage of Sec. 325A, where there was no discussion. Certainly, the two were close enough on the agenda for Congress to realize that the employment of men on public works on behalf of the Government were the same public works on which a bond was sought to be waived.

B. All Authorities on the Point, Have Consistently Held That the Eight Hour Law Has Extra-Territorial Effect.

A reading of the statute, which is unambiguous and clear, states as follows:

> "*Every* contract made to which the United States, * * * is a party and every such contract made for or on behalf of the United Sttaes" (Sec. 324). (Italics ours.)

The common sense meaning of "every" is too clear to be broken down any further. *Gibbons* v. *Ogden*, 9 Wheat. 188. In this latter case, Justice Marshal said that Congress "must be understood to have employed words in their natural sense and to have intended what they have said." That Congress has the power to legislate extra-territorially, particularly with respect to its own citizens, is conceded by the petitioners, and especially with regard to the matters at hand (Pet. Brief, p. 12). *Rose* v. *Himely*, 4 Cranch. 241, 279; *The Appollon*, 9 Wheat. 362, 370; *Blackmer* v. *United States*, 284 U. S. 421, 437; *United States* v. *Bowman*, 260 U. S. 94, 98. In the latter two recent cases cited, although the extra-territorial effect was not as clearly indicated as in the case at bar, the power of Congress to legislate extra-territorially, over its citizens wherever situated, was confirmed. The Court below had no difficulty in ascribing extra-territorial effect to this statute when it said: "Words of such inclusive reach cannot properly be read to exclude contracts of government jobs abroad" (R. 136).

The administrative branches of the Government of the United States, ever since it was called upon to interpret the extra-territorial effect of this statute, had no difficulty in reaching the same conclusion especially as applied to American workers as they have unanimously maintained

that the Eight Hour Law at its various stages of amendment has extra-territorial effect. In 25 Op. Atty. Gen. 441 (1905), Attorney General Moody in reply to the Secretary of War for an opinion directly to this point stated as follows:

> "Although the Canal Zone is now within the sovereign jurisdiction of the United States and hence within the legislative power of Congress, Congress has not legislated for it except so far as I have indicated and the case stands so far as the applicability of the act of 1892 is concerned exactly as if the territory were beyond the legislative powers of the United States.
>
> But although Congress has no power to enact laws which shall apply beyond the jurisdiction of the United States, it still has power to determine what shall be the length of the days' work of any and all persons employed by the Government or by contractors of any public works undertaken by the United States anywhere. Congress may if it chooses fix the hours of labor in the work of the United States wherever it is conducted and make the law binding on the officers of the United States and through the agency of the contract through the contractors with the United States. In other words, it may direct the action of its own officers and agents and dictate the terms of its contracts made with the Government. The law thus becomes applicable anywhere" (p. 444).

At this time, the Act of 1892 was in force and the question concerned mechanics and laborers working in the Panama Canal Zone in the building of the Canal, which at that time was conceded by the Attorney General, to be "a foreign territory."

Subsequently, it is true, this was held in 34 Op. Atty. Gen. 257, 261, to apply only to American workers as against alien laborers, but said opinion specifically concurred with Attorney General Moody as to the extra-territorial effect of the Eight Hour Law. Also, 29 Op. Atty. Gen. 488.

Furthermore the Comptroller General of the United States, when called upon to render an opinion concerning the extra-territorial application of the Eight Hour Law, had no difficulty in coming to the same conclusion and has held the Eight Hour Law to have extra-territorial effect at least with respect to American laborers and mechanics working on public projects for or on behalf of the United States (19 Comp. Gen. 516, 518). In this case the question put was whether the provisions of the Eight Hour Law should be included in a contract for work in a foreign country which required the employment of foreign laborers. His answer to the question was in the negative as long as it concerned the employment of foreign laborers or mechanics. The entire discussion by the Comptroller General was to the effect that the Statute was for the protection of American workers in foreign countries and not foreign workers.

The President of the United States also has interpreted the Act as having extra-territorial effect as is evidenced by his promulgation of Executive Order No. 8623 (Code of Fed. Reg. Cum. Supp. Tit. 3, P. 850). In that Order the President specifically exempted public construction built under contracts with the Government in Bermuda from the application of the Eight Hour Law and it must be further assumed that this was taken upon the advice of the then Attorney General; petitioner has attempted to minimize the importance of this regulation by stating that Bermuda has been held by the Circuit Court of Appeals, Second Circuit, to be a Territory or Possession of the United States which case is now pending before this Court. *Con-*

nell v. *Vermilya-Brown Co.*, 164 F. 2nd 924.* This was not the position of the Government at the time the Executive Order was issued nor was it the position of the Solicitor General in the recent argument in the above case before this Court, in attempting to overrule the Circuit Court of Appeals, where he contended that Bermuda was a foreign territory even though under lease.

Furthermore, in interpreting the broad language of a statute this court has said in *National Labor Board* v. *Hearst Publications*, 322 U. S. 111, 129:

> "In this light, the broad language of the acts, the definitions which in turn rejected conventional limitations of such conceptions as 'employee', 'employer' and 'labor dispute', leaves no doubt that its applicability is to be determined broadly in doubtful situations by underlying economical facts rather than technically and exclusively by previously established legal classifications."

And further, in the same case, this Court went on to say that the terms used, like other provisions, must be understood with reference to the purpose of the act and the facts involved in the economic relationship and said "where all the conditions of the relation require protection, protection ought to be given" (p. 129).

In the case at bar, there is no question but that an American laborer, who leaves his home and country to work on foreign soil under intolerable and substandard

*This case has since been decided by this court by opinion handed down on December 6, 1948, and some of the language of the majority opinion can be related to this case, and is as follows:

> "A fortiori, civil controls may apply, we think to liabilities created by statutory regulation of labor contracts even if aliens may be involved where the incidents regulated occurred in areas under the control and not within the territorial jurisdiction or sovereignty of the nation enacting the legislation." (Page 4.)
>
> "Under such circumstances our duty as a court is to construe the word possession, as our judgment instructs us the law makers, within constitutional limits, would have done and had they acted in the type of the legislation with the present situation in mind." (Page 10.)

conditions (as in the case at bar where respondent worked in the heat of the desert for stretches of 16 hours at a time) is entitled to equal protection under the law as those at home, especially when protection can be given under the terms of the Act. To hold otherwise, would contravene the manifest purpose of the Congress when Section 325A of the U. S. C. was enacted with full knowledge of the fact that these American workers would be used on government contracts abroad.

Similarly, Workmen's Compensation Acts enacted by various states, have been held by this Court and the State Courts, to have extra-territorial effect with respect to the sovereignty of each state. *Industrial Commission* v. *McMartin*, 330 U. S. 622, 626; *Alaska Packers Association* v. *Industrial Accident Comm.*, 294 U. S. 532, 542-543; *Matter of Post* v. *Berger and Goldie*, 216 N. Y. 544, 549; *Schover Bates & Co.* v. *Walsh*, 226 U. S. 111, 123.

The Department of Labor, in response to an inquiry, also answered this particular question in the affirmative and stated as follows:

> "In view of the fact that this opinion (34 Op. Atty. Gen. 257) is limited to aliens working in foreign countries and since the attorney general indicated that this opinion is not inconsistent with that reported at 25 Op. Atty. Gen. 441, the conclusion seems to be that the Eight Hour Law is applicable to an American citizen working in a foreign country provided that the worker otherwise comes within the provisions of the act" (Letter 10 16 46 App. A).

C. Petitioners' Argument on This Point Is Unsound.

The attorneys for the petitioners in their brief have engaged in semantics in attempting to destroy the forcefulness of the opinion below and the respondent's contentions, both in answer to this point and the remaining points.

at issue. This straining and subtle differentiations of words, meanings and intents have characterized their effort and their conclusions are far removed from the real purposes of the Act, and the common sense interpretation considered under the light of our present advancement in our social and political thinking. If this court had construed the Constitution of the United States in the manner prescribed by the arguments of the petitioner in this case, that document would indeed be a document of strangulation. However, such elasticity of interpretation is not even needed in interpreting the Act at issue. Petitioners' type of argument has been commented upon by this Court in the case of *United States* v. *Bennett*, 232 U. S. 299, 304, as follows:

> "We come now to consider the contention that when the statute is correctly interpreted there will arise a conflict between its provisions and the safeguards of the situation, not only for the purpose of demonstrating the unsoundness of the assertions but also with the object of making it clear that even if the statute was susceptible of a duplicate construction by resort to subtlety of reasoning or refinement of distinction, there is nothing of such gravity in the asserted constitutional question as to lead us to resort to such means in order to avoid giving to the statute the meaning which we have affixed to it resulting from its unambiguous text."

Furthermore, the Solicitor General of the United States, in opposing respondent's arguments, in an attempt to justify its present position and realizing full well that it has a primary duty to enforce the Acts of Congress and to protect the American citizen, has practically admitted that the only reason he is opposing the enforcement of the statute is because the United States Government is in the position of an employer in this case (Pet. Brief, p. 11). It never was the function of the Attorney General's Office

of the United States to oppose the just interests of the citizens of this country and their protection under the law, merely because the Government has a financial interest in the outcome and to interpret the laws for its own pecuniary benefit just as any self-centered or greedy individual.

In attempting to distort the clear meaning of the Act and the previous authorities which have held the Eight Hour Law to have extra-territorial effect, the attorneys for the petitioners have strained the wording of the Statute to such an extent as to find themselves in the unenviable and anomalous position of supporting alien labor to the detriment of American laborers to whom they owe a prime duty of protection under our laws. In defense of their opposition, the government's attorneys have been forced to the conclusion that the Act should protect alien workers as well as American workers and since the Act has been held not to include alien workers, therefore American workers are likewise not to be protected (Pet. Brief, pp. 30-32). We are herewith concerned with the protection of American laborers and all of the authorities that have so far passed upon this point have concluded at least that the American laborer comes within the coverage of the Act, both by intent and by its language.

In attempting to show that the Eight Hour Law should not be construed extra-territorially, the petitioner makes much of the fact that this is a criminal statute and hence ordinarily is not applicable extra-territorially. Petitioner indicates that civil statutes, however have a much broader scope and application. Although petitioner practically destroys this tenuous argument by admitting that criminal statutes have also been interpreted to have extra-territorial scope (Pet. Brief, p. 15) we are however dealing with the civil aspects of the Statute and the criminal aspects have no bearing on the matter.

Previous authorities have held that the Eight Hour Law and similar statutes have both criminal and civil remedies. 39 Op. Atty. Gen. 448, 422; *Helvering* v. *Mitchell*, 303 U.

S. 391, 399; *Alexander v. Strohmeyer & Arle Co.*, 243 N. Y. 458, 465. In 39 Op. Atty. Gen. 418 (*supra*), Attorney General Jackson said in construing the Eight Hour Law:

> "It is my opinion therefore that the sanction provided for in the 1912 act is civil or remedial and not criminal" (p. 422).

Certainly Section 325A has no criminal purpose, as the provisions are purely civil and it is the benefit of this remedy which the respondent seeks to avail himself. The Court below in discussing this point said:

> "Insofar as the civil aspects of the statute are concerned * * *" (R. 37).

The reading of the Congressional Record during the passage of the Eight Hour Law and its amendments, show that Congress intended to directly benefit the American worker employed under Government contracts and certainly at the time of the passage of Section 325A in 1940, intended to protect American laborers working in foreign lands on Government projects as it was well within the contemplation of that Congress that the naval appropriation was specifically for the purpose of building bases for our protection everywhere in the advent of war.

II.

The respondent employee has a right to sue under the statute.

Under the Act of 1868, the Eight Hour Law merely contained a provision that a laborer or mechanic employed by the Government on its public works could not be employed for more than eight hours a day. While this law was still in effect, this Court interpreted said act to be merely a directive in the Government's administrative capacity and that an employee could not recover against the

government for overtime pay, as there was nothing stated therein governing the rate to be paid. In *United States* v. *Martin*, 94 U. S. 400 (1876), the Court stated:

> "It does not specify any sum which shall be paid for eight hours nor that the price shall be more than the eight hours are greater or less when the hours are fewer."

However, subsequently, this Court ruled under the Letter Carrier's Act of 1888 (25 U. S. Stat. 157, ch. 308), that a letter carrier could sue the Government for overtime pay for hours in excess of eight hours per day under the Eight Hour Law (*United States* v. *Post*, 148 U. S. 124). Said Act read as follows:

> "Hereafter eight hours shall be considered a day's work for letter carriers in city and postal district connected thereto for which they shall receive the same pay as is now paid for a day's work of a greater number of hours. If any letter carrier is employed a greater number of hours per day than eight, he shall be paid in the same proportion to the salary fixed by law."

The Court therefore stated in *United States* v. *Post* (*supra*):

> "The statute was manifestly one for the benefit of the carriers and it does not lie in the mouth of the Government to contend that the employment in question was not extra service and to be paid for as such * * *." (p. 133).

Subsequently, cases under the Eight Hour Law were brought by employees on public works who were not covered by the Postal Act, and the courts consistently held that the reason for denial of the right of action was because the then Eight Hour Law and Amendments contained no provisions prescribing a rate of pay as to employees

other than postal employees. *Coleman* v. *United States*, 81 Fed. 824, 826; *Swisher* v. *The United States*, 57 Ct. of Claims, 123; *Timmonds* v. *United States*, 84 Fed. 933, 935; *United States* v. *Moses*, 126 Fed. 58.

In the case at bar, the amendment of 1940 (325A U. S. C.), which prescribes the rate of pay and the time supplies the same omissions to the Eight Hour Law as did the Letter Carrier's Act, which enabled an employee to sue thereunder. The Court below in its opinion states as follows:

> "So read the statute differs little from the Letter Carrier's Act, * * *, which has been interpreted to bestow a right to sue upon employees within its coverage" (R. 134).

More generally, this Court has held that where a statute was passed for the benefit and protection of certain classes of persons that said person has a cause of action for damages in the event of violation, although the statute does not provide such a remedy. *Warner* v. *Goltra*, 298 U. S. 155, 158; *Texas & Pacific Railway* v. *Rigsby*, 241 U. S. 33, 39; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2nd 945; *National Labor Relations Board* v. *Hearst Pub.* (*supra*).

In the case of *Walling* v. *Patton-Tulley Transp. Co.* (*supra*), the Eight Hour Law was construed directly and the Court had no difficulty in holding that the Act applied to a limited classification of employees in a certain definite class for the Court said:

> "We perceive no difficulty in the reconcilement of the Eight Hour Law amendment with the Fair Labor Standards Act. The one limits employment as basic pay to 40 hours a week and the other deals

solely with daily employment of men *in certain classifications* and limits such employment at basic pay to eight hours a day" (p. 748). [Italics ours.]

In the case of *Texas & Pacific Ry. v. Rigsby* (*supra*), this Court said:

> "A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover damages from the party in default is implied * * *" (p. 39).

In the aforesaid case, the statute involved was the Safety Appliance Act, which provided a similar type of civil penalty, in that the violator was penalized $100.00 for each violation and the statute gave no right to sue to an injured employee. Yet the Court upheld the right of an employee to sue under the statute because he was a beneficiary under the Act.

While the petitioner, in opposition to this point, tacitly concedes that if it was the intention of Congress to benefit the worker covered by the Eight Hour Law then a right of action would accrue (Pet. Brief, p. 42) he claims that the worker was not the beneficiary. Again a fair reading of the statute (which in so many words states that laborers and mechanics on public contracts are to be compensated at time and a half for all hours over eight hours per day [Sec. 325A]), could only mean that those workers were to be the recipients of the overtime pay. The court below on this point said:

> "The statute it will be seen has a two fold purpose. One is to secure to the individual workman a minimum living wage fixed by law and the other is

to penalize the employer who fails to pay that wage . . .

If we recognize—as we believe as we must, that the Eight Hour Law sought to elevate labor standards in employment on public works by requiring the employer to pay extra compensation for hours in excess of eight (see *Walling* v. *Patton-Tully Transportation* [*supra*], [p. 949]), it would be both unreasonable and unjust to say that that laborer has no claim for overtime pay. We conclude that such could not have been the legislative purpose" (R. 135).

Overnight Motor Co. v. *Missel*, 316 U. S. 572; *City of Phoenix* v. *Drinkwater*, 46 Ariz. 470 476; *McNulty* v. *City of New York*, 238 N. Y. 29; *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 750-751.

The Act, particularly Section 325A, is directed to a limited class of persons as it covers only "laborers and mechanics" working on public contracts as opposed to all other persons working for the Government or in private industry. How can the petitioners argue, in the face of this clear language, that those persons mentioned are not in a specific category and hence not a class to be benefited? Furthermore, the discussions in the Congressional Record, since the passage of this Act, shows that Congress was very conscious of the fact that only employees of the Government came within the protection of the Act as opposed to private industry, and doubtful supporters of this Act made it very clear that it was not to apply to private industry and that private employers were free to contract and bargain without statutory control (Cong. Rec., *supra*).

III.

Respondent is entitled to recover under the third party beneficiary doctrine.

Even if it is held that the respondent has no right to sue under the statute itself he does have a right to recover by reason of the inclusion in the contract that the petitioner had with the United States Government of the provision, whereby the petitioner agreed to "abide by all applicable laws, regulations, ordinances and other rules of the United States of America of the State, territory or political subdivision thereof or any other duly constituted public authority, wherein the work is done" (R. 98).

There is no difference between the Federal Law and the law of the State of New York, on the question of third party beneficiaries. Both jurisdictions hold in general, that before the third party beneficiary doctrine can be invoked, there must be a benefit to a particular class of persons. *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 230; *United States* v. *National Surety*, 309 U. S. 165; *Robbins Dry Dock* v. *Flint*, 275 U. S. 303, 307; *Lawrence* v. *Fox*, 20 N. Y. 238; *Seaver* v. *Ransom*, 224 N. Y. 233; *Strong* v. *American Fence Construction Co.*, 245 N. Y. 48; *Prescott* v. *Collins*, 263 App. Div. 690.

In the case of *Prescott* v. *Collins* (*supra*), the New York State court specifically declared that its rulings were the same as in the Federal courts, and cited the Federal cases in support thereof. Therefore, the suggestion in petitioner's brief at the foot note at page 44, that the Court below did not see any difference between the Federal law and the New York law and hence erred in its conclusion, is erroneous.

Petitioner's real objection revolves around the same point that they have made consistently, *i. e.* that the Eight Hour Law and its amendments were not to benefit laborers

and mechanics employed by the Government or by contractors for the Government. This conclusion has been demonstrated previously to be unsound and contrary to a plain reading of the statute and the specific words contained therein. The Court below stated in this regard as follows:

> "In our view, that agreement when related to the statute, was in effect a promise to pay their workers such extra compensation for overtime work entitled and aggrieved laborer or mechanic to enforce that promise as a third party beneficiary" (R. 137).

The Eight Hour Law, by it's terms confers a benefit upon laborers and mechanics on public contracts for or on behalf of the government, and require that they be paid time and a half for all hours worked over eight hours a day (Secs. 324-325A U. S. C.). Other courts, in the construction of the Act on this very point, have concurred with the decision arrived at by the court below. *N. B. Deal & Co. Inc.* v. *Martin*, Ark. Sup. Ct. 1946, 193 S. W. 2nd 315; *Page* v. *Kilgore*, 131 S. W. 2nd 730 (1944); *Wallington* v. *Patton-Tulley Transp. Co.* (*supra*).

Generally, the labor union cases (contracts between a union and an employer) and the N. R. A. cases, have also held that the provisions therein are for the benefit of the employee and an employee has a right of action under the third party beneficiary doctrine. *Gulka* v. *Barton*, 164 A. D. 293; *Mesleh* v. *Schulte*, 273 N. Y. S. 699. The discussion in Congress during the passage of the Eight Hour Law of 1892, further demonstrates that the specific class of workers meant to be benefited directly were the government laborers and employees on public contracts and that as an example of humanity, it would show the world that this Government, at least, was humane as to its workers. 23 Cong. R. 5727.

The petitioner's argument that the wording of the clause in the contract cannot be read to include the Act is wholly opportunistic, for if the Government would have withheld payment on the ground the said contract did not contain a clause by which petitioner agreed to abide by the terms of the Eight Hour Law, which was concededly a necessary requirement under the Statute (Sec. 324), the petitioners would be the first to point to this clause as complying with that mandatory provision. Furthermore, it is axiomatic in the law that the Courts will attempt to uphold the legality of a contract when it can be read to make it legal and will not interpret a contract so as to make it invalid if it is susceptible to two interpretations.

The argument of the petitioner, that the respondent is bound by the written contract between the parties, has no merit as one cannot avoid a statutory obligation and violate the law merely by agreement between the parties.

Conclusion.

It would appear that the arguments of the petitioner in attempting to persuade this court to overrule the judgment of the Court of Appeals, State of New York, is based upon intricate reasonings and subtleties that avoid the plain reading of the Statute and the common sense purposes of the Eight Hour Law and its Amendments. Actually, the previous actions of the petitioners and their attorneys in this matter belie their present position because all "laborers and mechanics" who unquestionably fell in the classification of laborer or mechanic, were paid overtime on this very job (R. 38). The only workers who were not paid overtime were those in a similar position to the respondent herein, such as cooks, whose classification in this regard was very doubtful in the opinion of the petitioners. One of their prime arguments in resisting payment in the Trial Court, was that this respondent was not

a "laborer or mechanic", within the meaning of the Act because he was a cook (R. 49-50). The Trial Court ruled, however, after the hearing of the evidence, that he was a "laborer or mechanic", within the meaning of the act and denied petitioner's application on that ground (R. 81). The attorneys for the Government realizing that there was no basis in fact to this contention abandoned this argument on the subsequent appeals.

Furthermore, the arguments raised by the attorneys for the petitioner are wholly in the realm of legalistic speculation and are far removed from the realities of the case for we have an American employer hiring American labor in the United States (New York) to perform services under a contract made with the Government of the United States in the United States using American materials for the benefit of the United States. Can the petitioners contend that under these circumstances the applicable laws of the United States as to conditions of such construction are not controlling and that Congress did not intend to so legislate?

It is respectfully submitted, therefore, that the judgment below should be confirmed.

December 1948.

CHESTER A. LESSLER,
Attorney for Respondent.

HOWARD HENIG,
Of Counsel.

Appendix A.

DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
Washington 25

October 16, 1946

Chester A. Lessler, Esquire
551 Fifth Avenue
New York 17, New York

Dear Mr. Lessler

This will reply to your letter of October 4, 1946, in which you indicate that you represent an American citizen who was employed as a cook during 1942 and 1943 in the construction of roads in Iran and Iraq, the roads being constructed by a contractor pursuant to a contract with the Government of the United States. You wish to know (1) whether an American citizen, who otherwise comes within the provisions of the Eight-Hour Law, is deprived of its benefits because his work was in a foreign country and (2) whether a cook is a 'laborer' within the coverage of the Act.

(1) In 25 Op. Atty. Gen. 441 (1905), the Attorney General was requested by the Secretary of War to express an opinion concerning the applicability of the Eight-Hour Law to laborers and mechanics engaged in the construction of the Panama Canal. The Attorney General pointed out that subsequent to the enactment of the Eight-Hour Law of 1892, the United States secured sovereign jurisdiction over the Canal Zone, but it has thus far (1905) failed to legislate for the Zone (with the exception of matters having no relation to the problem under consideration) so that 'the case stands' so far as the applicability

of the Act of 1892 is concerned, exactly as if the territory were beyond the legislative powers of the United States." He went on to say that inasmuch as Congress has authority to regulate labor conditions on government public works outside the territorial limits of the United States and since the language of the Eight-Hour Law is not limited to public works in the United States, the Act applies to employees working on such projects in foreign countries.

In 34 Op. Atty. Gen. 257 (1924), the Attorney General expressed the opinion that the Eight-Hour Law does not 'apply to work to be performed by alien laborers and mechanics upon public works of the United States within the territorial limits of a foreign country', because there cannot be imputed to Congress 'the intent to better labor conditions in a foreign country or benefit alien laborers and mechanics employed outside the territorial jurisdiction of the United States.' In view of the fact that this opinion (34 Op. Atty. Gen. 257) is limited to aliens working in foreign countries and since the Attorney General indicated that this opinion is not inconsistent with that reported at 25 Op. Atty. Gen. 441, the conclusion seems to be that the Eight-Hour Law is applicable to an American citizen working in a foreign country, provided that the worker otherwise comes within the provisions of the Act.

* * * * * * *

Very truly yours,

DONALD M. MURTHA
Assistant Solicitor."

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